

Opting Out

The term 'opting out' in Canadian constitutional discourse refers broadly to any action by which a province, of its own volition, is excluded from a measure that applies to the other provinces. However, it is important to distinguish clearly between two kinds of 'opting out'. Opting out of a federal, or federal-provincial, program is entirely different from 'opting out' of a constitutional amendment. There has been no actual instance of the latter, but it is at least theoretically possible, under certain conditions, since 1982 (see amending formula).

In the former, and more usual, sense the practice of opting out may be traced to the agreement on the financing of universities between the governments of Canada and Quebec in the latter part of 1959. Federal grants to Canadian universities had begun a few years earlier, but the Duplessis government in Quebec had prevented Quebec universities from accepting them. Soon after Duplessis's death in 1959, an agreement was reached whereby the federal tax on corporations was reduced in Quebec and Quebec's provincial tax on corporations was increased. Quebec then used the additional revenue to pay grants to its universities equivalent to those which universities in other provinces received from the federal government. Under the federal Pearson government (1963-68), Quebec was offered, and accepted, the opportunity to opt out of several shared-cost programs, including youth allowances and hospital insurance, with corresponding abatements of federal taxation in Quebec. In return, Quebec promised to maintain a similar program from its own resources. This approach lost favour with the federal government when Pierre Trudeau became Prime Minister. However, the Meech Lake Accord, drafted in 1987 after Quebec requested constitutional restrictions on the federal spending power, would have guaranteed the right of any province to opt out, with financial compensation, from any new shared-cost program in a field of provincial jurisdiction, provided it carried on a program compatible with federal objectives.

The term 'opting out' is also used, somewhat misleadingly, with reference to section 38(3) of the *Constitution Act, 1982*. That section, originally proposed by Alberta, provides that a provincial legislature may exclude its province from the operation of any constitutional amendment that would transfer a provincial matter into federal jurisdiction. Financial compensation would be provided only if the amendment pertained to education or culture. As many as three provinces, comprising less than half of Canada's population, could exclude themselves but the amendment would still apply to the other provinces. This complicated procedure has never actually been used, and possibly never will be.

Sources:

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Constitution 1976-1982 (Toronto: Carswell/Methuen, 1984).

- D.V. Smiley, *Constitutional Adaptation and Canadian Federalism since 1945* (Ottawa: Queen's Printer, 1970).